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In The

Supreme Court of the United States

October Term, 1995

STUBBLEFIELD CONSTRUCTION COMPANY and STUBBLEFIELD PROPERTIES,

Petitioners,

v.

CITY OF SAN BERNARDINO,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California Fourth Appellate District, Division Two

PETITIONERS' REPLY MEMORANDUM

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14 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PETITIONERS' REPLY MEMORANDUM 1

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Bello v. Walker, 840 F.2d 1124 (3d Cir. 1988), *cert. denied*, 488 U.S. 851 *and* 488 U.S. 868 (1988) 8

Blanche Rd. Corp. v. Bensalem Township, 57 F.3d 253 (3d Cir. 1995), *reh'g denied*, 1995 U.S. App. LEXIS 15990 (1995) (*en banc*), *petition for cert. filed*, 64 U.S.L.W. 3122 (U.S. Aug. 22, 1995) (No. 95-249) 7, 8

Chiplin Enters. v. City of Lebanon, 712 F.2d 1524 (1st Cir. 1983) 6

Cloutier v. Town of Epping, 714 F.2d 1184 (1st Cir. 1983) 6

Creative Env'ts, Inc. v. Estabrook, 680 F.2d 844 (1st Cir.), *cert. denied*, 459 U.S. 989 (1982) 6, 7

DeBlasio v. Zoning Bd. of Adjustment, 53 F.3d 592, 601 (3d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3086 (U.S. Aug. 8, 1995) (No. 95-163) 8

Del Monte Dunes v. City of Monterey, 920 F.2d 1496 (9th Cir. 1990) 8

Estate of Himelstein v. City of Fort Wayne, 898 F.2d 573 (7th Cir. 1990) 7

Executive 100, Inc. v. Martin County, 922 F.2d 1536 (11th Cir. 1991) 8

Geo-Tech Reclamation Indus., Inc. v. Hamrick, III, 886 F.2d 662 (4th Cir. 1989) 7

Gilbert v. City of Cambridge, 932 F.2d 51 (1st Cir.), *cert. denied*, 502 U.S. 866 (1991) 6

Greenbriar Ltd. v. City of Alabaster, 881 F.2d 1570 (11th Cir. 1989) 7, 8

TABLE OF AUTHORITIES – Continued

Page

Halvorson v. Skagit County, 42 F.3d 1257 (9th Cir. 1995) 7

Licari v. Ferruzzi, 22 F.3d 344 (1st Cir. 1994) 6, 9

Littlefield v. City of Afton, 785 F.2d 596 (8th Cir. 1986) 5

Marks v. City of Chesapeake, 883 F.2d 308 (4th Cir. 1989) 8

Moore v. City of East Cleveland, 431 U.S. 494 (1977) 3

Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685 (3d Cir. 1993) 7

Pearson v. City of Grand Blanc, 961 F.2d 1211 (6th Cir. 1992) 5, 7

PFZ Properties, Inc. v. Rodriguez, 928 F.2d 28 (1st Cir. 1991), *cert. granted*, 502 U.S. 956 (1991), *cert. dismissed*, 503 U.S. 257 (1992) 4, 7

Resolution Trust Corp. v. Town of Highland Beach, 18 F.3d 1536 (11th Cir. 1994)..... 8

Scott v. Greenville County, 716 F.2d 1409 (4th Cir. 1983)..... 7

Shelton v. City of College Station, 780 F.2d 475 (5th Cir. 1986) 7

Sinaloa Lake Owners' Ass'n v. City of Simi Valley, 882 F.2d 1398 (9th Cir. 1989)..... 7

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1..... 2

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) ..... *passim*

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PETITIONERS' REPLY MEMORANDUM

1. The principal argument advanced in the Brief For Respondent In Opposition ("Opp. Br.") is that Stubblefield cannot attack the legal standard applied below because "they got review of their substantive due process claim under the very legal standard that they say they are entitled to: the *Euclid* rational basis test." Opp. Br. at 9; *see also Id.* at 2, 10, 12, 16. According to respondent, the court "quoted the *Euclid* standard . . . and said again and again that it was evaluating the City's conduct here under that standard." *Id.* at 10. The fallacy in that argument is the

Court of Appeal did not apply, or even purport to apply, the *Euclid*[1] rational basis test.

A passing reference to the *Euclid* case appears in one footnote discussing the case's procedural history, the court merely observing that the first question in the jury's verdict form (App. A43) was apparently derived from the *Euclid* case. App. A3 n.1. Nowhere else in the opinion does the court cite, much less discuss or apply, the *Euclid* test.

Respondent apparently believes that the lower court's five recitations of the phrase "arbitrary and irrational" constitutes application of the *Euclid* test. The court uses the phrase "arbitrary and irrational" twice in describing what Stubblefield argued (App. A21 n.10, A26); once in citing to *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (one challenging legislation carries burden of establishing that legislature acted in "arbitrary and irrational" way); and twice in concluding that plaintiffs did not, "as a matter of law," show "arbitrary or irrational government action." App. A29.

But make no mistake about it, repetition of the mantra, "arbitrary and irrational," is not what the *Euclid* rational relation test is all about. That much is clear from the seminal articulation of the test in *Euclid* itself ("arbitrary and unreasonable, *having no substantial relation to* the public health, safety, morals, or general welfare") and from this Court's application of the *Euclid* test in subsequent cases. The test does not give a court *carte blanche* to

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[1] *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)

apply its subjective notion of what is arbitrary or irrational. Rather, it requires a court to determine: (1) if the challenged action serves a legitimate governmental purpose, and (2) if the means employed are rationally related to the legitimate purpose. *Moore v. City of East Cleveland*, 431 U.S. 494, 498 n.6 (1977). The opinion below, like the First Circuit opinions it blindly follows, does neither.

Had the lower court actually applied the *Euclid* test, it would have reached a different result. It unabashedly concedes that the actions of Steve Marks and the City Council "were taken with the Stubblefield project in mind, *and were taken for the purpose of blocking the project . . .* " (App. A35 (emphasis added)); that the urgency ordinance changing the long-established policy of processing development projects under the rules in effect at the time an application was filed had "[n]o justification . . . except the desire to block approval of the Stubblefield project" (App. A8); and that the two-story height limitation and related conditional use permit requirement were "aimed at the Stubblefield project" (App. A7-A8).[2] The court never made the required *Euclid* inquiry to determine whether creating intentional roadblocks to a *ministerial* project approval is a legitimate governmental purpose.[3]

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[2] The height limitation and conditional use permit requirements were not only "aimed" at the project, they were specifically intended to block approval of the project. Three members of the council and the planning director so testified. RT 1268, 1465, 2352-53, 2142-43.

[3] Respondent suggests that the project required "some ministerial and some discretionary" approvals. Opp. Br. at 2. The unrefuted record, however, establishes that all approvals for a

Furthermore, even if the court had made that inquiry and had, by some inexplicable leap of legal logic, deemed such an objective to be legitimate, it would still have been required to examine the *means* used to accomplish the objective. Here, the court should have asked, at a minimum, whether legislative manipulations, intentional delays, misleading assurances, deliberate threats, and intimidation of staff and council members comprised rational means for achieving legitimate goals. It did not.

Respondent tries to cover for the court's failure to perform an ends/means analysis. It states that the court "concluded" that Stubblefield's claim failed "because the City's conduct was not legally irrational in that it is not sufficiently keyed to any legitimate state interests." Opp. Br. at 7 (internal quotations deleted). But the court never reached such a conclusion: the quoted language merely appears in the middle of a lengthy, two-page quotation from *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28, 31-32 (1st Cir. 1991), *cert. granted*, 502 U.S. 956 (1991), *cert. dismissed*, 503 U.S. 257 (1992). App. A28.

To further bolster its argument that the lower court applied *Euclid*, respondent states that the court determined the City's conduct "plainly had a rational relation to the legitimate public purposes of neighborhood preservation and environmental quality." Opp. Br. at 8. That analysis is nowhere in the opinion. Nor did the

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"Review of Plans" ("ROP") were ministerial. App. A46-A49. The fact that the City Council ordered preparation of an environmental impact report when none was required under the ROP procedures (App. A50-A51), merely establishes that the City imposed an unjustified requirement.

court below find that the City had applied certain zoning measures so Stubblefield would not "contravene and thus undermine the citywide standards established in the zoning rules. . . . " *Id.*[4] The court below did not cite *Euclid*, quote *Euclid*, analyze *Euclid*, discuss *Euclid*, or in any manner apply *Euclid*. In pointed contrast to respondent's argument, the court did not apply the standard urged by Stubblefield.

2. Respondent's second argument is that the different substantive due process formulations in the circuits "may not actually amount to any meaningful, outcome-determinative difference," and that "it is hardly clear that the First Circuit truly has an 'abberant position' on this issue." Opp. Br. at 13. This incredible assertion is not only at odds with the observations of other circuits,[5] but it is refuted by the language employed and the analytical process applied in the First Circuit cases themselves. Indeed, the First Circuit substantive due process cases are

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[4] Stubblefield's project not only met all requirements of the Review of Plans procedure (RT 1294-95; App. A51), it met all requirements of the new R-3 zoning ordinance except the two-story height limitation inserted solely to effect its demise. RT 2432-33; 2578. There was no legislative record or trial evidence suggesting any purpose, much less a "legitimate" purpose, for the 2-story height limitation.

[5] *See Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1217 (6th Cir. 1992) (in First Circuit, substantive due process is not violated "even when accompanied by claims of purposeful, malicious obstruction of a landowner's rights"), and *Littlefield v. City of Afton*, 785 F.2d 596, 604 (8th Cir. 1986) (First Circuit has consistently held § 1983 claims may not be based on denial of permit, even if malicious, in bad faith, and for invalid and illegal reasons).

palpably distinguishable from those decided by the majority of circuits in two respects: they do not apply a *Euclid*-based end/means analysis, and they refuse to examine objectives or motives of government officials charged with misconduct.

The frequently cited First Circuit substantive due process cases (relied upon by the court below) do not even cite *Euclid*. *Creative Env'ts, Inc. v. Estabrook*, 680 F.2d 844 (1st Cir.), *cert. denied*, 459 U.S. 989 (1982); *Chiplin Enters. v. City of Lebanon*, 712 F.2d 1524 (1st Cir. 1983); *PFZ Properties*, 928 F.2d 28. Neither do they inquire into the government's objectives or the means used to achieve them.[6] Rather, they make a generalized, *ad hoc* determination of whether or not the claim is a "typical run of the mill dispute between a developer and a town planning agency." *Creative Env'ts*, 680 F.2d at 833. For if "[t]he claim that denial of the permit was improperly motivated [is] unsupported by an allegation of the deprivation of a specific constitutional right, [it] simply raises a matter of local concern. . . . " *Chiplin Enters.*, 712 F.2d at 1527. *PFZ Properties* held that delaying tactics and refusal to issue permits for the plaintiff's project based on considerations outside its jurisdiction, without more, did not rise to the level of a substantive due process violation. 928 F.2d at 32.

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[6] The same is true of *Licari v. Ferruzzi*, 22 F.3d 344 (1st Cir. 1994) and *Gilbert v. City of Cambridge*, 932 F.2d 51 (1st Cir.), *cert. denied*, 502 U.S. 866 (1991), which are cited by respondent (Opp. Br. at 13), and of *Cloutier v. Town of Epping*, 714 F.2d 1184, 1189 (1st Cir. 1983).

In sharp contrast to the First Circuit are those circuits which not only cite *Euclid*, but actually apply its two-part test, analyzing the government's purpose and the rationality of the government's means. This is evident in *Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685, 692 (3d Cir. 1993); *Geo-Tech Reclamation Indus., Inc. v. Hamrick, III*, 886 F.2d 662, 666 (4th Cir. 1989); *Shelton v. City of College Station*, 780 F.2d 475, 479-80 (5th Cir. 1986) (*en banc*); *Pearson v. City of Grand Blanc*, 961 F.2d at 1211, 1223 (6th Cir. 1993); *Estate of Himelstein v. City of Fort Wayne*, 898 F.2d 573, 577 (7th Cir. 1990); *Sinaloa Lake Owners' Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1407 (9th Cir. 1989); *Halvorson v. Skagit County*, 42 F.3d 1257, 1262 (9th Cir. 1995); and *Greenbriar Ltd. v. City of Alabaster*, 881 F.2d 1570, 1577 (11th Cir. 1989).

To test the conflict between the First Circuit and other circuits, one need only compare *Blanche Rd. Corp. v. Bensalem Township*, 57 F.3d 253 (3d Cir. 1995), *reh'g denied*, 1995 U.S. App. LEXIS 15990 (1995) (*en banc*), *petition for cert. filed*, 64 U.S.L.W. 3122 (U.S. Aug. 22, 1995) (No. 95-249), or *Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983), where the courts found liability, with *Creative Env'ts.*, 680 F.2d 822, or *PFZ Properties*, 928 F.2d 28, where the courts denied liability, finding that the claims were merely everyday planning disputes. All four cases involve landowners subjected to abusive, delaying tactics in the development process. The Third and Sixth Circuits found liability; the First did not.

A principal reason for this split is the majority of circuits' willingness to examine motives and purpose underlying official conduct. Under the *Euclid* test, in

order to determine if the purpose or objective of governmental conduct is legitimate, a court must examine the motives of those acting on behalf of the government. Where the First Circuit, and now California state courts, consider motives to be "irrelevant," other circuits properly consider motives to be paramount.[7]

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[7] *See, e.g., Bello v. Walker,* 840 F.2d 1124 (3d Cir. 1988), *cert. denied,* 488 U.S. 851 *and* 488 U.S. 868 (1988) (council members interfered with development process for partisan political or personal reasons unrelated to the merits of the application); *Blanche Rd. Corp. v. Bensalem Township,* 57 F.3d 253 (3d Cir. 1995), *reh'g denied,* 1995 U.S. App. LEXIS 15990 (1995) (en banc), *petition for cert. filed,* 64 U.S.L.W. 3122 (U.S. Aug. 22, 1995) (No. 95-249) (defendants intentionally conspired to impede project development for reasons unrelated to an appropriate government purpose); *DeBlasio v. Zoning Bd. of Adjustment,* 53 F.3d 592, 601 (3d Cir. 1995), *petition for cert. filed,* 64 U.S.L.W. 3086 (U.S. Aug. 8, 1995) (No. 95-163) (genuine issue of fact existed as to whether defendant improperly interfered with zoning decision for personal reasons); *Marks v. City of Chesapeake,* 883 F.2d 308, 313 (4th Cir. 1989) (deliberations impermissibly tainted by irrational neighborhood pressures); *Del Monte Dunes v. City of Monterey,* 920 F.2d 1496, 1508 (9th Cir. 1990) (defendants' actions motivated by political pressure from neighbors rather than legitimate regulatory concerns); *Executive 100, Inc. v. Martin County,* 922 F.2d 1536, 1541 (11th Cir. 1991) (citing *Greenbriar Ltd. v. City of Alabaster,* 881 F.2d 1570, 1577 (11th Cir. 1989) (deprivation of constitutional stature if undertaken for improper motive and by means that are pretextual, arbitrary and capricious, and without rational basis)); and *Resolution Trust Corp. v. Town of Highland Beach,* 18 F.3d 1536, 1549 (11th Cir. 1994) (deprivation of property interest rises to level of substantive due process violation if done for improper motives and achieved through means that are arbitrary and capricious and lacking any rational basis).

3. Finally, respondent attempts to divorce the lower court's opinion from those of the First Circuit on which it relies, arguing that "no court imposes a more demanding standard than the rational relation standard applied by the court below . . . " (Opp. Br. at 9), and that the First Circuit position "demands *less* justification from local governments than the rational relation test that was applied. . . . " Opp. Br. at 12. As shown, however, the court below did not apply the *Euclid* test, either expressly or implicitly. Rather, it blindly adhered to the language and approach of the trilogy of First Circuit cases, concluding without analysis that a "rational basis" existed because the City Council was responding to constituents' concerns and its actions were "general in nature."[8]

Not only have courts in the Sixth and Eighth Circuits noted the obstacles imposed by the First Circuit, *see supra,* note 5, but even the case cited by respondent, *Licari v. Ferruzzi,* 22 F.3d 433, 349-50 (1st Cir. 1994), underscores the difficulty an owner faces pursuing a substantive due process claim in that circuit: "we have never announced a rule precluding district courts from finding substantive due process violations by land use planning officials in

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[8] In fact, the R-3 ordinance height limitation was not "general," but was directed at the project (App. A7 to A8); the moratorium boundary was approved only after being gerrymandered to include the project and assuage the demands of Marks' successor (RT 1482); and the action on the grandfathering request denied Stubblefield the project approval it would have received absent the City's intentional obstruction of the development process. RT 1339.

every conceivable case." That the First Circuit felt compelled to note it could "conceive" of such a case if pressed, is all that needs to be said.

CONCLUSION

The court below transformed this Court's deferential standard (rationally related to a legitimate state interest) into an insurmountable obstacle. The decision sends a clear and unmistakable message that the ends justify the means, that as long as public officials can concoct, after the fact, some hypothetical objective which sounds "rational," they may use any means whatsoever to achieve that end. The decision signals a startling and disturbing departure from substantive due process law in the majority of circuits, opening the door for misguided public officials to trample on property owners' rights with judicially sanctioned impunity. Substantive due process should continue to serve both to deter such wrongdoing and to provide a remedy when it in fact occurs.

Respectfully submitted,

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